## Barton Nelson, Inc. and United Paperworkers International Union, AFL-CIO, CLC, Petitioner. Case 17–RC-11047

August 25, 1995

## DECISION AND DIRECTION OF THIRD ELECTION

## BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held February 10, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to an agreement to set aside election and conduct rerun election entered into by the parties subsequent to the first election held December 22, 1993. The tally of ballots shows 78 for and 90 against the Petitioner, with 2 void and 8 nondeterminative challenged ballots.

The Board has reviewed the record in light of the Petitioner's exceptions and brief and the Employer's reply brief. We have decided to adopt the hearing officer's findings<sup>1</sup> only to the extent consistent with this Decision and Direction of Third Election.

Unlike the hearing officer, we find that the conduct of at least three of the Employer's supervisors in directly distributing antiunion hats to employees amounted to objectionable conduct that warrants setting the election aside. The facts presented at the hearing show that about a week before the February 1994 election, the Employer's supervisors distributed hats to unit employees. These hats included the following message on the front, stating, "what Part of UNiOn Don't They Understand," with the N and O in "UNiOn" printed in a contrasting color. Bindery Shift Supervisor Chuck Novak handed a hat to everyone in his area with the explanation, "Here's a free hat." When an employee asked about what he could do if he didn't want a hat, Novak responded that he could throw it away. Night Shift Supervisor Linda Jones testified that she presented the hats to her employees by explaining that they could have one if they wanted one. Press Supervisor Stan Hunter testified that when he handed out a hat to every employee, he stated, "Here's another hat.''2

The hearing officer relied on the absence of evidence that anyone kept a list of who did or did not take the proffered hats to find their distribution

unobjectionable.<sup>3</sup> Notwithstanding the absence of list-keeping in this case, we find that, under the circumstances, the supervisors' conduct was objectionable.

It is undisputed that an employer may make antiunion paraphernalia available to employees at a central location unaccompanied by any coercive conduct.<sup>4</sup> Here, however, the Employer did more than make the hats available; rather, various supervisors personally distributed the hats, presumably to a large number of unit employees, a week before the second election. When supervisors approach individual employees and solicit them to wear antiunion or proemployer paraphernalia, the employees are forced to make an observable choice that demonstrates their support for or rejection of the union.<sup>5</sup>

Contrary to our dissenting colleague's analysis, we find the Employer's conduct here analogous to that found in *Gonzales Packing Co.*, above, where a supervisor approached 10 voters at their workstations the day before the election and, in the presence of a large number of unit employees, asked them if they wanted vote-no stickers. Here, as in *Gonzales Packing*, supervisors personally offered antiunion hats to unit employees.<sup>6</sup>

We also dispute the dissent's suggestion that we are applying a per se analysis whenever a supervisor has been involved in distributing antiunion paraphernalia, rather than analyzing whether the distribution was coercive under the "totality of the circumstances," or that the Board in "distribution" cases preceding *Rossmore House*<sup>7</sup> applied such a per se analysis. In particular, we note that when the Board adopted the judge's finding in *Lott's Electric Co.*, se citing the Board's pre-*Rossmore* decision in *Kutz-Kasch*, that the employer's distribution of antiunion buttons violated

<sup>&</sup>lt;sup>1</sup>The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>&</sup>lt;sup>2</sup>Supervisors had also distributed hats for the Employer prior to the first election.

<sup>&</sup>lt;sup>3</sup>The case distinguished by the hearing officer, *House of Raeford Farms*, 308 NLRB 568 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), involved the employer's distribution of 'vote no' shirts to unit employees. The employee distributing the shirts on behalf of the employer kept a list of the employees who requested them, thus enabling the employer to ascertain the employees' union sentiments. The Board found that this conduct reasonably tended to interfere with employee free choice in the election.

<sup>&</sup>lt;sup>4</sup>See House of Raeford Farms, supra; Gonzales Packing Co., 304 NLRB 805, 815 (1991); Lott's Electric Co., 293 NLRB 297, 304 (1989).

<sup>&</sup>lt;sup>5</sup>See Gonzales Packing, supra; Lott's Electric Co., supra; Kurz-Kasch, Inc., 239 NLRB 1044 (1978); and Pillowtex Corp., 234 NLRB 560 (1978).

<sup>&</sup>lt;sup>6</sup>In concluding that the Employer's conduct was objectionable, we note in particular the judge's comment in *Gonzales Packing* that he was aware of ''. . . no case in which it was found legally innocent for a supervisor . . . directly to approach a substantial number of employees . . . and to invite those employees on-the-spot to choose whether or not to display an antiunion slogan.'' 304 NLRB at 815–816.

<sup>&</sup>lt;sup>7</sup> 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

<sup>8</sup> Supra at 304.

Section 8(a)(1), it relied on the fact that the employer did more than make the buttons available to employees. Specifically, the judge detailed that a supervisor distributed the buttons to employees just before they reported, as directed, to the employer's facility to watch a campaign movie. In our view, the circumstances here are similar to those in *Lott's Electric*.

Consequently, we shall set the election aside and direct a third election.

[Direction of Third Election omitted from publication.]

MEMBER STEPHENS, dissenting in part.

Like my colleagues, I would not rely solely on the fact that no list was made of which employees accepted or rejected the antiunion hats proffered by the Employer's supervisors to determine whether the election should be set aside. I disagree with them, however, that the supervisors' direct distribution of antiunion paraphernalia amounts to objectionable conduct sufficient to set aside the results of an election. Rather, in determining whether alleged preelection misconduct warrants setting aside the election results, I would not follow a per se approach, but would consider the totality of the circumstances. My consideration would extend not only to the timing of the alleged misconduct, the number of potential voters affected, and the closeness of the election, but also to whether the conduct, when viewed in context, could reasonably be found to have a coercive effect.

The majority opinion accurately recounts the indifferent manner in which supervisors distributed the hats. In addition, the record contains numerous statements by the Petitioner's witnesses that throughout both election campaigns union supporters openly displayed their sentiments by wearing buttons and hats favoring the Petitioner.

In this setting, I do not find that the supervisors' distribution of the hats warrants setting aside the election. To the extent that such distribution has been analyzed as a form of interrogation of employees' union sentiments, I find that a per se analysis would conflict with relevant Board law, i.e., the standard for assessing alleged coercive interrogations enunciated in *Rossmore House*<sup>2</sup> and expanded in *Sunnyvale Medical Clinic*. In

those decisions, the Board rejected a per se approach in favor of a totality of the circumstances analysis. As explained above, the objecting party has failed to make any showing that the distribution of the antiunion hats was, in context, coercive. Indeed, the situation in the instant case contrasts starkly with the situation in Gonzales Packing Co.,4 where a supervisor of 50-60 employees singled out 10 employees the day before the election to ask if they wanted a "NO" sticker like those worn by antiunion employees.<sup>5</sup> In that case, the Board affirmed the judge's application of Rossmore House to find an 8(a)(1) violation and correspondingly found that this conduct warranted ordering a new election. The judge noted, in particular, that the employees whom the supervisor approached with the stickers had already indicated that they were unwilling to be identified with the "NO" movement and that the supervisor's approach would therefore reasonably have been viewed by them as pressure from management to become active in the antiunion campaign.6

Despite their denial that they are applying a per se rule, my colleagues in the majority are, in my view, doing exactly that when they predicate a violation of Section 8(a)(1) solely on the fact that supervisors personally asked employees if they wanted the antiunion hats. This is not different in principle from automatically finding a violation of Section 8(a)(1) whenever a supervisor poses a question to an employee about his or her views on the union. It is for this reason that I find the majority's view in conflict with *Rossmore House* and *Sunnyvale*.

Here there is no independent evidence of coercive behavior, and the record establishes that the Employer's antiunion campaign was free from unfair labor practices. Consequently, applying the *Rossmore House* and *Sunnyvale* standard, I would adopt the hearing officer's recommendation to overrule the Petitioner's objections and certify the results of the election.

<sup>&</sup>lt;sup>1</sup> See Lott's Electric Co., 293 NLRB 297, 304 (1989).

<sup>&</sup>lt;sup>2</sup>269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

<sup>&</sup>lt;sup>3</sup>277 NLRB 1217 (1985).

<sup>4304</sup> NLRB 805 (1991).

<sup>&</sup>lt;sup>5</sup> Although the Board found that a supervisor's distribution of "Vote No" buttons amounted to unlawful interrogation in *Lott's Electric*, supra at 304, a decision that issued subsequent to *Sunny-vale*, it specifically relied for its ruling on *Kurz-Kasch*, 239 NLRB 1044 (1978), a case that preceded both *Rossmore House* and *Sunny-vale*. The distribution in *Lott's*, moreover, occurred against a background of myriad unfair labor practices that the Board found sufficiently egregious to merit a bargaining order, a context of coercion clearly absent from the instant case.

<sup>6304</sup> NLRB at 816.